

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE:)
) CA No. 01-12257-PBS
PHARMACEUTICAL INDUSTRY AVERAGE) CA No. 06-11337-PBS
WHOLESALE PRICE LITIGATION) Pages 1 - 27
)

STATUS CONFERENCE

BEFORE THE HONORABLE PATTI B. SARIS
UNITED STATES DISTRICT JUDGE

United States District Court
1 Courthouse Way, Courtroom 19
Boston, Massachusetts
May 3, 2010, 3:43 p.m.

LEE A. MARZILLI
OFFICIAL COURT REPORTER
United States District Court
1 Courthouse Way, Room 7200
Boston, MA 02210
(617)345-6787

1 A P P E A R A N C E S:

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4 JAMES J. FAUCI, ESQ., Assistant United States Attorneys,
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Court, Suite 9200, 1 Courthouse Way, Boston, Massachusetts,
02210, for the United States.

5
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7
8 JAMES J. BREEN, ESQ., The Breen Law Firm,
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for the Relator, Ven-A-Care of the Florida Keys.

9
10 WILLIAM A. ESCOBAR, ESQ. and SARAH L. REID, ESQ.,
Kelley, Drye & Warren, 101 Park Avenue, New York, New York,
10178, appearing for Dey Corporation.

11
12 MARTIN F. MURPHY, ESQ., Foley Hoag, LLP,
Seaport West, 155 Seaport Boulevard, Boston, Massachusetts,
02210-2600, for Dey Corporation.

P R O C E E D I N G S

THE CLERK: In Re: Pharmaceutical Industry Average Wholesale Price Litigation, Civil Actions 01-12257 and 06-11337, will now be heard before this Court. Will counsel please identify themselves for the record.

MR. HENDERSON: George Henderson for the United States.

MR. BREEN: Jim Breen for the Relator, Ven-A-Care of the Florida Keys.

MR. FAUCI: Jeff Fauci for the United States.

MS. SMITH: Barbara Healy Smith for the United States.

MS. THOMAS: Susan Schneider Thomas for the Relator Ven-A-Care.

MR. ESCOBAR: Bill Escobar for Dey.

MR. DALY: Sarah Reid for Dey.

MR. MURPHY: Martin Murphy for Dey, your Honor. Good afternoon.

THE COURT: Thank you. When is this case scheduled for?

MR. HENDERSON: We have no trial date, your Honor. It was scheduled for April 26, but because of a settlement with Roxane --

THE COURT: Oh, right, you lost your spot in the pecking order. All right.

MR. HENDERSON: That's right, yes.

1 THE COURT: So, first of all, we need a new date
2 today, and, second of all, we need to figure out what we're
3 going to try.

4 MR. HENDERSON: Yes.

5 THE COURT: So I found the briefing very helpful on
6 this point because I'm not going to try a three- or four-month
7 trial. So basically I'm not even sure I'm willing to try a
8 two-month trial without trying to prune it down. So at this
9 point we can have some argument. I didn't accept the fact that
10 there would be a Seventh Amendment problem. I'm going to try
11 the Medicare case only with the two drugs. And now the issue
12 is, I have now, unfortunately -- and I underscore
13 "unfortunately" -- sat through two five-week trials. I have
14 another week of the second one coming up, and in particular, on
15 the civil side, it is deathly, deathly boring, to the point of
16 juries falling asleep, to sit and listen to one videotape
17 deposition after another. And so what I'd like to understand
18 is why I need so many videotaped depositions if it's just a
19 Medicare case, and whether or not we can get this down to two
20 weeks a side, by which I mean 9:00-to-1:00 days, three and a
21 half hours a day.

22 MR. HENDERSON: Your Honor, I have a chart that I
23 think would be useful, and it basically summarizes the --

24 THE COURT: Yes, I saw it. That was in the materials
25 you gave me.

1 MR. HENDERSON: No. Actually this is a more concise
2 summary of both sides' listings.

3 THE COURT: Okay, I'm happy to take it.

4 MR. HENDERSON: I think it would be useful to get a
5 sense of what both the United States and Dey -- I understand
6 the figures for Dey that I've put down are close enough. I
7 gave this to Dey before bringing it in, and the top half of it
8 indicates the Medicare-only witnesses and exhibits. And you
9 can see that the "expect to call" witnesses for both sides,
10 eliminating about seven overlaps where the witnesses are the
11 same, there are about thirty-eight witnesses.

12 THE COURT: Does that include depositions? Yes.

13 MR. HENDERSON: Yes, and that's an issue that I'd like
14 to raise, your Honor. Dey has listed about fifty -- of their
15 total sixty-three witnesses, about fifty of those are witnesses
16 who they may call by deposition or live or may call by
17 deposition, which means we've got fifty deposition designations
18 that we don't --

19 THE COURT: Well, just practically speaking, A,
20 there's not going to be enough time, and, B, if there's
21 anything of the trial lawyer in you, I guarantee you that it is
22 the least good form of advocacy that exists. The First Circuit
23 will have a field day. They don't care if it's by deposition
24 or alive. I guarantee you this jury will be asleep. I have
25 been sitting on trial since January, and I've seen it happen.

1 MS. REID: Your Honor, if I may be heard for a moment,
2 it would be very helpful if the government in their April 26
3 filings, which reduce the number of Medicare witnesses, would
4 tell us who they've taken off the list because then we can
5 further reduce --

6 THE COURT: Well, maybe. I'm just simply -- let's
7 figure --

8 MS. REID: Because we understand your Honor's point.
9 We want to bring it down as much as we can, but a lot of what
10 we have left is --

11 THE COURT: I think if it's one drug, one defendant,
12 this should be able to be done in a month, two weeks a side.
13 Now, I'm guessing because no one's told me exactly who's coming
14 on, what they're testifying to, and I think there should be a
15 stipulation with to respect a lot of the documents. I don't
16 think we need custodians of the records. I think there are
17 going to have to be some efforts to prune even further. This
18 is helpful. You've given me roughly the same estimates, right,
19 four to six weeks and what a Medicare trial would look like
20 with two drugs. Excuse me?

21 MR. HENDERSON: Two drugs, your Honor.

22 THE COURT: Right, right, ipratropium bromide.

23 MR. HENDERSON: Ipratropium bromide and albuterol
24 sulfate.

25 THE COURT: Right. So I don't understand why we need

1 two drugs and one defendant. I was able to do multiple drugs
2 and four defendants in a month on a bench trial in the general
3 AWP case. I think people are going to have to just -- I don't
4 have the time to sit and do a six-week trial, plus I have to
5 tell you, it is unbelievably difficult to get a jury who will
6 sit over the summer for sure.

7 So let's talk about realistically my trial schedule.
8 You have lost your place in line essentially. I've got three
9 criminal trials. I'm on a criminal trial which will finish at
10 the tail end of next week, and I have to go to Washington for a
11 week and a half or something like that, and then I've got three
12 more criminal trials back to back. I have two civil trials
13 ahead of you. I've got the Commonwealth v. Mylan, which is my
14 number one guilt list trial because they've been waiting longer
15 than you have, and then I have a question. It's two Foley Hoag
16 cases actually. I'm not sure if Foley is involved, but
17 Max-Planck and this one which are, you know they could flip a
18 coin as to who gets me first, but they're both about the same
19 length of trial, let's say a four-week kind of trial. So I
20 could make an argument for each of them. Probably Max-Planck
21 has a little more urgency to it, but I don't feel strongly
22 about it.

23 MR. MURPHY: On that case, your Honor, my partners
24 told me two weeks, for what it's worth.

25 THE COURT: Two weeks? All right, thank you. Oh,

1 that's useful.

2 All right, so assume for a minute --

3 MR. ESCOBAR: Your Honor, can I just address one thing
4 that may help?

5 THE COURT: Yes.

6 MR. ESCOBAR: Since your Honor has decided that this
7 will be a Medicare only --

8 THE COURT: It will be.

9 MR. ESCOBAR: Okay. We've been trying to get the
10 government to negotiate settlement on Medicare only, both
11 because your Honor indicated that that would be the case that
12 would be tried when we were last here --

13 THE COURT: Right.

14 MR. ESCOBAR: -- and also because they've indicated
15 that the Medicaid case, their view is that it would settle
16 itself if we resolved Medicare. We don't disagree with the
17 general concept, and what we would propose is that your Honor
18 order a one-day mediation with Professor Green on the
19 Medicare-only case.

20 THE COURT: I'm happy to do that, but it just won't
21 delay the trial, so --

22 MR. ESCOBAR: I understand that, but I thought that
23 would be useful to have at least in the mix.

24 THE COURT: So let me just ask you, how many actual
25 live people do you know that you're going to call? Because I'm

1 trying to figure out, if I schedule over the summer, it wreaks
2 havoc if I have a monthlong trial. It's hard to get because
3 jurors are on vacation, and it's hard to get because people are
4 on vacation, and you are all on vacation, so --

5 MR. HENDERSON: Live witnesses that we would call?

6 THE COURT: Yes, how many live witnesses do you know
7 of right now? Maybe you could list them.

8 MR. HENDERSON: Well, our list has fifteen live
9 witnesses and nineteen --

10 THE COURT: I don't care about the deposition people.
11 A, you're going to have to cut them anyway, but, B -- I mean,
12 in other words, prune it back, but I don't have to deal with
13 their vacation schedules, so --

14 MR. HENDERSON: Fifteen witnesses that we expect to
15 call live.

16 THE COURT: How about, how many live people do you
17 know of right now?

18 MR. HENDERSON: I'm not sure I understand the
19 question.

20 THE COURT: For Dey, for Dey. I'm sorry.

21 MS. REID: Let me just look, your Honor. Your Honor,
22 at this point there aren't going to be more than seven to ten
23 live witnesses. It depends a lot, as I said, on who the
24 government is calling live because my belief is, a large
25 portion of Dey's case will go in through the government's

1 witnesses that they've called live. So we could give you a
2 concrete number on the live witnesses if Mr. Henderson could
3 just share the names of his witnesses, and then we can give you
4 that in a matter of a week or two. I mean, it's --

5 THE COURT: I tend to take vacation the tail end of
6 August, so one way of approaching this -- I don't know what
7 your personal schedules are like -- is to start in July or
8 August and jump over it and go into September. I could put you
9 on on a rolling list in June and just, for all I know, Mylan
10 could settle or Max-Planck could settle, or all these criminal
11 cases could plead.

12 MR. DALY: Your Honor, at the moment I have another
13 AWP trial that starts June 14.

14 THE COURT: It could settle, it could go away.

15 MR. ESCOBAR: So far it hasn't.

16 THE COURT: Well, let me just, if I could, there are
17 so many lawyers on both sigh, I don't think I should operate
18 off of people's vacation schedules necessarily because I don't
19 think I would ever get a date.

20 MR. MURPHY: No, and we wouldn't ask you to operate
21 off of vacation schedules, your Honor, but I think with respect
22 to other trial commitments, in light of competing trial
23 commitments, when we were last here, we suggested September 13
24 as a date when all the folks on the defense side were
25 available. I think the government's objection was that it

1 seemed a long time away --

2 THE COURT: It does, and I don't want to lose the
3 momentum for mediation.

4 MR. MURPHY: -- less time away. I don't think, your
5 Honor, given the amount of work that's necessary in this case,
6 that any of us are going to fall into a slumber if we --

7 THE COURT: But it's six months away is the thing,
8 isn't it, or not quite at this point?

9 MR. MURPHY: It's May, so that's September. That's
10 four months, your Honor.

11 THE COURT: Four months? Do you all agree?

12 MR. HENDERSON: We're ambivalent, your Honor. It does
13 seem like a long way away.

14 THE COURT: What do we have on for September 13? I'm
15 almost positive that Mylan and Max-Planck, one of them will go
16 is the thing.

17 (Discussion between the Court and Clerk.)

18 THE COURT: I'll put it on September 13, and I'm going
19 to order you to mediation in the interim. I'm limiting you to
20 ten motions in limine apiece.

21 Let me put it this way: I am horrified -- and you can
22 bring this back to the Max-Planck people on both sides -- I
23 received forty motions in limine. I'm certainly not going to
24 rule on them. At some point there are resource issues. So ten
25 motions in limine without subparts apiece with normal

1 formatting. I'm about to reject all the motions in limine in
2 Max-Planck and make people prioritize. Oh, and that doesn't
3 even include the four Daubert motions. I'm not doing it, okay.
4 I'm not doing it. So there needs to be a little bit of
5 prioritization on what's a good use of my resources. So at
6 least on this case, ten motions in limine apiece, September 13,
7 and are there any Daubert motions that I don't -- what do I
8 need to catch up with you to get today on the motions --

9 MR. HENDERSON: May I just for clarification? The
10 limit on ten motions in limine, does that include or exclude
11 Daubert motions?

12 THE COURT: Includes.

13 MR. HENDERSON: Okay. The government has an
14 outstanding Daubert motion with regard to Dey's principal
15 expert, Dr. Bradford. I think it raises important issues.

16 THE COURT: That's the extrapolation issue?

17 MR. HENDERSON: No.

18 THE COURT: No. This is the --

19 MR. HENDERSON: This is a number of issues. We start
20 off with the fact that Dr. Bradford has calculated alternative
21 scenarios based on the opinion that Medicare could have used
22 WAC, and that Dey is not responsible for its AWP's --

23 THE COURT: Can I apologize profoundly? I don't
24 know -- I've had so many Daubert hearings involving AWP cases.
25 Is it Professor/Dr. Duggan? Is that still outstanding?

1 MR. HENDERSON: Yes.

2 THE COURT: For Medicare?

3 MR. HENDERSON: Yes. That was an Abbott motion.

4 MR. ESCOBAR: We filed one with respect to Dr. Duggan
5 in this case, both on his Medicare and Medicaid opinions.

6 THE COURT: So that's already been filed and briefed?

7 MR. ESCOBAR: That's correct. I think the briefing
8 has concluded on that one. There's also --

9 THE COURT: So the one that you're referring to, maybe
10 I sound brain dead, but have I had a Daubert hearing on it yet?

11 MR. HENDERSON: No.

12 THE COURT: Not Bradford, so I need a hearing on
13 Bradford.

14 MR. ESCOBAR: Yes.

15 THE COURT: So that would be a good thing to schedule
16 today, right, a hearing on Bradford?

17 MR. ESCOBAR: And Duggan.

18 THE COURT: No, not Duggan. Haven't I already heard
19 Duggan's?

20 MR. ESCOBAR: You heard them in the Abbott case.

21 THE COURT: I'm not going to sit and redo it.

22 MS. REID: But it's different.

23 MR. ESCOBAR: It's a different motion, your Honor.

24 THE COURT: Oh, I thought you said you --

25 MR. ESCOBAR: A different expert report, a different

1 motion, it's an entirely different --

2 THE COURT: Is it the same extrapolation?

3 MR. ESCOBAR: The extrapolation is one part of it, but
4 there are several grounds on --

5 THE COURT: I'll read it before I decide whether to
6 have a hearing because I had four days' worth of hearings on
7 that. I mean, Duggan, a huge piece of it he's -- I don't know
8 if the right word is "abandoned," but certainly the government
9 is not pressing with the Medicaid -- is it the Medicaid piece?
10 What was he not pressing?

11 MR. BREEN: Part of the Medicare damages, your Honor.

12 THE COURT: All right, but I don't have to worry about
13 that for the Medicare, but there's still some outstanding -- I
14 don't have to worry about what he abandoned. It doesn't
15 affect. Medicare is still outstanding. With respect to
16 extrapolation, I will not hold a new hearing on that if it's
17 the exact same issue, but you're telling me there are some new
18 issues.

19 MR. ESCOBAR: That's correct, your Honor.

20 THE COURT: I don't know, I'll read it first.
21 Bradford I haven't heard anything on, so let me just read it
22 first. Nowadays everyone is filing Daubert on everything.
23 Before I schedule a hearing, I will read both motions. So
24 that's Duggan and Bradford. Are there any other Daubert
25 motions?

1 MS. REID: I just want to point out, Bradford has one
2 final briefing which will be short and which should be filed
3 this week, so when you're --

4 THE COURT: Well, what are we up to?

5 MS. REID: This will be our surreply, which the
6 government has consented to.

7 THE COURT: All right, I like surreplies. Just
8 nothing more, it stops, no more briefing.

9 MS. REID: So the briefing should be complete on that
10 by the end of this week.

11 THE COURT: Now, what are the issues?

12 MS. REID: With Professor Bradford? Professor Bradford
13 is our expert on the generic industry. He also has Medicare
14 opinions as well as Medicaid opinions. Given your Honor's
15 ruling, I assume the Medicaid opinions will not be at issue
16 for --

17 THE COURT: What's the big -- maybe I'll just turn to
18 them. What's your big challenge at this point?

19 MR. HENDERSON: There are a couple of pieces to the
20 Medicare opinions. One is, Dr. Bradford opines that the
21 history of government knowledge exonerates manufacturers,
22 including Dey, for responsibility with respect to AWP's; and he
23 calculates alternative damages approach, assuming that Medicare
24 could have used WAC instead of AWP. That's one issue.

25 THE COURT: So that's not really Daubert?

1 MR. HENDERSON: Well, it's more of a legal issue, your
2 Honor, and you should read the brief, the briefs.

3 THE COURT: I promise, I will read the briefs, but
4 that's not really Daubert. Daubert for me, I hold evidentiary
5 hearings when I don't understand what the heck you're talking
6 about, like the statistical issues with Duggan where someone
7 just has to teach me, you know, I just don't understand it.
8 This I may not need one, right?

9 MR. HENDERSON: Possibly. You'll have to read the
10 briefs, your Honor. The other issues focus largely on the
11 dispensing fee, after the Medicare Modernization Act the
12 increase in dispensing fee. And Dr. Bradford basically says
13 that Medicare intended to cross-subsidize, and that increased
14 dispensing fee that occurred after the reforms, after the time
15 period that's at issue here, is the amount of reduction
16 essentially that should be --

17 THE COURT: It's like a proxy for what the subsidy is?
18 Is that the gist of it?

19 MR. HENDERSON: That's essentially it, so --

20 THE COURT: That's not -- that's been their position
21 since the day they walked into court with the position that
22 this was all one big political question because there was a
23 decision. But, I mean, that's not a surprise issue. I mean,
24 that's their issue.

25 MR. HENDERSON: No, it's not surprising.

1 THE COURT: Cross-subsidization has been it from day
2 one.

3 MR. HENDERSON: We challenge it, though.

4 THE COURT: Maybe, but it's not a Daubert issue
5 because Daubert is, you don't believe there's a reasonable
6 factual basis for something, you know. So it doesn't sound
7 factually complex. They have a subsidy, and they're claiming
8 it's a legal issue, whether or not it's an appropriate proxy.

9 MR. HENDERSON: It's both. It's legal and factual.

10 THE COURT: Maybe, but I don't know that I need a
11 hearing on it. It sounds like I can understand it, as opposed
12 to, with all due respect to the statisticians, I found that
13 really hard, so --

14 MR. HENDERSON: There's enough detail in his report,
15 so that if your Honor has difficulty understanding it, you may
16 want a Daubert hearing.

17 THE COURT: Okay, so I'm not scheduling a hearing
18 right now on those two. So those are the two Daubert motions
19 that have been filed?

20 MR. HENDERSON: Well, there are a couple of others as
21 well filed by Dey. They've challenged Dr. Schondelmeyer, who's
22 one of our expert witnesses, and Professor Marmor.

23 THE COURT: Say it again.

24 MR. HENDERSON: Marmor, M-a-r-m-o-r.

25 THE COURT: Well, why don't we do this then: Why

1 don't I set a day for us to argue those and talk about them,
2 but not have it be evidentiary unless I think I need it.

3 MR. ESCOBAR: That's fine, your Honor.

4 THE COURT: That way I focus it, you'll explain it to
5 me, and if I throw up my hands as I do every once in a while
6 and say, "I have no idea what you're talking about," then I'll
7 hold an evidentiary hearing.

8 MR. ESCOBAR: That's fine, your Honor.

9 THE COURT: It was really helpful with Dr. Duggan and
10 with the -- and I forget who Abbott's statistician was.

11 MR. BREEN: Hughes on the other side, your Honor.

12 THE COURT: It was very helpful. So what's a good
13 afternoon for us to use? Robert, just I think we'll probably
14 need at least a couple of hours anyway.

15 (Discussion off the record between the Court and
16 Clerk.)

17 THE COURT: Does July 8 destroy anyone's vacation for
18 the afternoon, or July 7 for that matter? Does July 7 or 8
19 destroy anyone's -- that's the week of July 4.

20 MR. HENDERSON: Not on the government's side, your
21 Honor.

22 THE COURT: So let's just --

23 MS. REID: That's okay.

24 MR. ESCOBAR: That's okay with us.

25 THE COURT: Let's just take July 7 in the afternoon.

1 MR. ESCOBAR: That's fine, your Honor.

2 THE COURT: I think we have a probation something, so
3 maybe 2:30 in the afternoon and just do argument on it. And in
4 the meantime, when do you want to go to mediation?

5 MR. HENDERSON: Well, the government is flexible. I
6 will say that we do not support the idea of a Medicare-only
7 mediation because, in our view, the Medicare piece is
8 appropriate for resolving the whole case, and we're just not
9 likely to want to just resolve the Medicare piece and leave for
10 trial the massive Medicaid --

11 THE COURT: Well, are you open to doing a global
12 resolution?

13 MR. ESCOBAR: Well, your Honor, I think we now have a
14 Medicare case. The only place where they seem to oppose
15 bifurcation is in negotiating, trying to negotiate a settlement
16 agreement.

17 THE COURT: Well, can I say, I think I'll send you for
18 mediation for all things, and if you can settle the Medicare
19 piece of it, then you can settle the Medicare piece of it.

20 MR. ESCOBAR: And on scheduling, I think, you know, we
21 could just schedule it as soon as Professor Green is available
22 and --

23 THE COURT: Call Professor Green and just get in there
24 in the month of May or June. And if you can settle just the
25 Medicare piece, I would hope that you could do that. I will

1 tell you, though, on the Medicaid piece, I am not authorizing
2 discovery. Discovery is closed. So on all these depositions,
3 if there wasn't an adequate incentive to cross-examine, then it
4 may not qualify under the rules.

5 MR. HENDERSON: The devil's in the details.

6 THE COURT: If there wasn't an adequate opportunity to
7 cross-examine, then you may be stuck. I mean, I'm not
8 reopening. Everyone should have seen this issue coming. If
9 there was no cross, I don't know what I'm -- I'm just not
10 reopening it all. It's been a long time coming. So --

11 MR. HENDERSON: If I can address one last issue, your
12 Honor?

13 THE COURT: Yes.

14 MR. HENDERSON: I think, in light of the Medicare-only
15 trial that will be scheduled, the United States will serve
16 revised witness and exhibit lists that focus --

17 THE COURT: When?

18 MR. HENDERSON: I guess we'd like a week. Within a
19 week we can do that.

20 THE COURT: Fine.

21 MR. HENDERSON: There is one issue. Both sides, much
22 more on the part of Dey than on the United States, have listed
23 depositions that the parties may present. And the rule,
24 Federal Rule of Civil Procedure 26, does not allow for
25 "may present" depositions. It does for exhibits and for live

1 witnesses, but for depositions it says "expect to present,"
2 period. Dey's list has fifty depositions that they may use.

3 THE COURT: Right. All right, this is going to make
4 it really easy for you. So two weeks a side. So that
5 essentially is Medicare only, two weeks a side. So that's
6 basically ten days. That's 35 hours a side. Do I have that
7 right, ten days? Well, no. But then -- is that 70 hours? But
8 I need a certain number of days on the house, if you will. I
9 need a day to impanel and do openings and a day to close and a
10 couple of days for jury instructions, so why don't we just
11 say -- so 30 hours apiece, why don't we just say, 30 hours
12 apiece. And by necessity, that's going to require you to cut
13 it back.

14 MR. HENDERSON: Well, I guess my --

15 THE COURT: So you shall give me the witnesses you
16 will call and the depositions you will use, given the 30-hour
17 parameter.

18 MR. HENDERSON: Exactly.

19 THE COURT: And the same with you, and the exhibits
20 you will introduce is how we'll do it.

21 MR. MURPHY: Maybe if we could get a date for a final
22 pretrial as well?

23 THE COURT: Yes, that's a great idea.

24 THE CLERK: When?

25 THE COURT: Right after Labor Day, I think, and then

1 you'll back up with a pretrial order.

2 (Discussion off the record between the Court and
3 Clerk.)

4 THE CLERK: That will be Wednesday, the 8th, at
5 3:00 o'clock.

6 MR. BREEN: September 8?

7 THE CLERK: September 8, yes.

8 THE COURT: To the extent there are Jewish holidays, I
9 would tend not to do the --

10 THE CLERK: That's the Thursday and Friday.

11 THE COURT: Of which week?

12 THE CLERK: Of the 9 and 10th.

13 THE COURT: So it's the Wednesday before that?

14 THE CLERK: That's right.

15 THE COURT: And then when is Yom Kippur?

16 THE CLERK: I think it's on a weekend, Judge.

17 THE COURT: Oh, al right, so that won't be an issue.

18 MR. HENDERSON: And one final thing, your Honor. The
19 United States some time ago filed a motion for leave to serve
20 subpoenas on out-of-state witnesses under the False Claims Act
21 for trial witnesses. It wasn't opposed by Dey. I have a
22 proposed order so we can get our live witnesses into Boston.

23 THE COURT: Okay.

24 MR. HENDERSON: May I approach?

25 MR. MURPHY: We assent, your Honor, and the way the

1 order is written, it would apply to either side, so Dey could
2 also subpoena witnesses.

3 THE COURT: Well, who pays?

4 MR. HENDERSON: A good question. We certainly pay for
5 the witnesses we call.

6 THE COURT: And you pay for the witnesses you call.

7 MS. REID: Right.

8 THE COURT: So what does "pay" mean?

9 MR. HENDERSON: Travel and per diem.

10 THE COURT: And hotel room?

11 MR. HENDERSON: That's included, yes.

12 THE COURT: And so you'll pay for yours.

13 MS. REID: Yes.

14 MR. HENDERSON: You might jot that down.

15 (Laughter.)

16 THE COURT: I say "at each party's own expense," by
17 which I mean you reimburse the person. I will try to
18 accommodate everybody's schedule. It's civil. It doesn't
19 really matter. We'll take people out of order. Are we flying
20 people in from distances or just Washington?

21 MR. HENDERSON: No. Lots of witnesses from
22 California, Florida.

23 THE COURT: Been there, done that. Another
24 possibility is, we have video conferencing, which might be more
25 convenient for people. It's not as boring as a deposition

1 because actually people are interacting, and I've done it in a
2 couple of civil trials really successfully, and it might be
3 cheaper for everybody to do that. It's just a thought. Would
4 anyone have an objection, now that you're sitting here thinking
5 about it? Good, so let's just say that is an agreement.
6 Anybody who wants to do that can do that. We have the
7 technology for it; we'll do it.

8 MR. HENDERSON: Okay.

9 THE COURT: So one-month trial. Robert will send out
10 a pretrial order on the scheduling of it. We need to address
11 Daubert.

12 MR. MURPHY: And just in terms of the pretrial order,
13 your Honor, the one thing that might not be in there that I
14 understand, because we've already provided names of witnesses
15 and exhibits, we think the government should go next and start
16 the process by telling us who they would call.

17 THE COURT: They just said they're going to do it in a
18 week. They just promised. I hope that's right.

19 MR. HENDERSON: Yes.

20 THE COURT: Now, let me just ask you the one horrible
21 question, which is, if Max-Planck settles, and if Mylan
22 settles, and if my criminal cases plead, how much would I be
23 destroying your lives to bring you in in June?

24 MR. ESCOBAR: Well, your Honor, as I said, I have a
25 trial on June 14.

1 THE COURT: Maybe. We all know how it goes.

2 MR. ESCOBAR: That's true, that's true, but at the
3 moment I have to assume it goes. The other thing is, you have
4 a second Mylan trial that I'm in on July 19. I don't know if
5 that's still on the schedule or not.

6 THE COURT: It's definitely still there.

7 MR. ESCOBAR: Okay.

8 THE COURT: But I'm hoping that whatever happens to
9 the first one settles the rest. So, I mean, as a practical
10 matter, I've got a really big problem because I have so many
11 backed-up trials. And Max-Planck is, like, desperate for my
12 time, as is Commonwealth v. Mylan, and they're just at this
13 point ahead of you in the pecking order. So I don't know
14 exactly when I'm going to get them in because, as I said, I
15 have three backed-up criminal trials which swear to me they're
16 not going to plead, so --

17 MR. MURPHY: For me, your Honor, the week of June 21,
18 I know the case is going to go. It's a case where the whole
19 focus is on a lawyer's conduct. I'm representing the lawyer,
20 so it would be a big deal if that were interfered with, not for
21 my personal life but for his.

22 THE COURT: Well, personal life is okay too. I'm not
23 going to make anyone miss a wedding or a graduation or a
24 mother's 80th birthday. I'm just not going to do it. But let
25 me just say this: I've got a lot of lawyers here. For just a

1 day, two people can carry it or for a couple of days. I mean,
2 I can't sort of sacrifice the whole thing on that. And I'd be
3 more than happy to let you out for a day or two if you have a
4 personal commitment. But I'm unlikely to be here the end of
5 August, but let's say I start clearing up in the summer, I hate
6 to let that beautiful space go for naught, so don't -- I mean,
7 I may call you up and say, "Any chance?"

8 MR. HENDERSON: That's fine with the United States.

9 THE COURT: All right. That's it, right?

10 MR. HENDERSON: Yes. I think we've covered
11 everything.

12 MR. BREEN: Your Honor, my daughter's getting married
13 the 28th of August, so I've got to make sure that week before
14 that I'm available. Your vacation is --

15 THE COURT: I'm moving my baby into college, so I'm
16 going to be there as well, so --

17 MR. BREEN: It didn't sound like any of these dates
18 were getting around there, but I just wanted to make sure, when
19 you said the end of August, it was about that time, so thanks.

20 THE COURT: All right. Just as long as you all commit
21 to never telling him I said that, so --

22 MR. BREEN: It's pretty safe with --

23 THE COURT: Okay, great. So I think the way we have
24 it is, within the next six weeks you're going to try to go in
25 and see Eric Green. I've got a date in July for the Daubert

1 hearing. That's what I owe you one way or another is a
2 response on that. You owe me a good-faith mediation on all the
3 issues, Medicaid and Medicare, and then if not, I see you in
4 September. Basically everybody's on board with this?

5 MS. REID: Yes, your Honor.

6 MR. HENDERSON: Yes. Thank you, your Honor.

7 MR. ESCOBAR: Thank you, your Honor.

8 THE COURT: Fine, all right.

9 THE CLERK: Court is in recess.

10 (Adjourned, 4:16 p.m.)
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C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I, Lee A. Marzilli, Official Federal Court Reporter,
do hereby certify that the foregoing transcript, Pages 1
through 27 inclusive, was recorded by me stenographically at
the time and place aforesaid in Civil Action Nos. 01-12257-PBS
and 06-11337-PBS, In Re: Pharmaceutical Industry Average
Wholesale Price Litigation, and thereafter by me reduced to
typewriting and is a true and accurate record of the
proceedings.

In witness whereof I have hereunto set my hand this 5th
day of May, 2010.

/s/ Lee A. Marzilli

LEE A. MARZILLI, CRR
OFFICIAL FEDERAL COURT REPORTER